

MT LEGISLATIVE HISTORY

Chapter 565 1989

Bill H (S) 153 Original bill & hist. C

H. Committee on Labor & Employment Relations S. Committee on Business & Industry

Hearing Date(s) Feb 28 ☒ C Hearing Date(s) Jan 20 ☒ C

 C Jan 23 ☒ C

 C Jan 25 ☒ C

 C C

Date Out March ☒ C Jan 25 ☒ C

Did this bill originate in an interim committee? Yes No

Committee Report

Note: A Free Conference Committee was appointed; however, its minutes are unavailable.

Senate Bills

STATUS SHEET

51st LEGISLATIVE SESSION

Business & Industry COMMITTEE

BILL NUMBER	ENTERED COM. DATE	DATE CON- SIDERED	OUT OF COM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMENDED DATE	DO NOT PASS AS AMENDED DATE	BE CON- CURRED IN DATE	BE NOT CON- CURRED IN DATE	BE CON- CURRED IN AMENDED DATE	BE NO CONCU IN AMEN DATE
SB 150	<i>Returned</i> 1/16 1/23	1/20 1/24	1/20 1/24			1/20 1/24					
SB 151	1/16	1/23 1/27	1/27			1/27					
SB 153	1/17	1/20 1/25	1/25			1/25					
SB 175	1/18	1/25	1/25	1/25							
SB 179	1/18	1/23 1/24	1/24	1/24							
SB 186	1/18	1/25	1/3			2/3					
SB 191	1/19	1/24 2/3	2/6				3/6 <i>Adverse Comm. Rpt.</i>				
SB 195	1/19	1/23	1/23	1/23							
SB 199	1/20	1/26	1/26	1/26							
SB 202	1/23	1/26 2/2	2/2			2/2					
SB 205	1/23	2/1 2/2 2/3	2/2	2/2							
SB 215	1/23	2/1 2/2 2/3	2/3			2/3					
SB 244	1/26	2/1 2/7	2/8			TABLE					
SB 245	1/26	1/31 2/2 2/3	2/3		2/3						

MINUTES

MONTANA SENATE 51st LEGISLATURE - REGULAR SESSION COMMITTEE ON BUSINESS AND INDUSTRY

Call to Order: By Chairman Gene Thayer, on January 20,
1989, at 10:00 a.m.

ROLL CALL

Members Present: Chairman Thayer, Vice Chairman Meyer,
Senator Noble, Senator Williams, Senator Hager, Senator
McLane, Senator Weeding, Senator Lynch.

Members Excused: Senator Boylan

Members Absent: None

Staff Present: Mary McCue, Legislative Council

Announcements/Discussion: None

HEARING ON SENATE BILL 153

Presentation and Opening Statement by Sponsor: Senator
Rasmussen, District 22, stated Senate Bill 153 dealt
with the outfitter laws. He said, the bill related to
a recent workers Compensation decision changing the
interpretation of employee or independent contractor
status.

List of Testifying Proponents and What Group They Represent:

Jack Hutchison - Fishing and Floating Outfitters
Association of Montana
Bob Butler - Butler Outfitting Co./Twin Bridges,
Montana
Paul Roos - Self/ Helena, Montana
Stan Bradshaw - Self/Helena, Montana
Tag Rittel - Montana Outfitter and Guides Association

List of Testifying Opponents and What Group They Represent:

None

Testimony:

Jack Hutchison stated, "This bill would bring the law more
in line with the actual working situation of the

of recognition for those guides who proved they meet the criteria of an independent contractor. He urged support of SB 153. (See Exhibit #4).

Tag Rittel said the Montana Outfitter and Guides Association enthusiastically supported SB 153. (See Exhibit #5).

Questions From Committee Members: Mr. Roos answered Senator Williams by stating he had found no single method of withholding Workers' Compensation. He said, some employers hired guides for an extended period of time, for guiding as well as other duties. In such instances, the employee status may fit, and withholding procedures are required.

Mr. Roos told Senator Noble, the ratio paid by outfitters varied from 27% to as low as a little over 7%.

Senator Weeding wondered if some outfitter ranchers used ranch hands as guides during rainy spells and if the hands were really qualified guides.

Mr. Roos said he thought this did happen sometimes, but most guides were licensed professional people. Guides usually have their own equipment and sometimes they own their own livestock.

Mr. Roos told Senator Williams he could not document the reasons for the fluctuation of insurance rates discussed earlier.

Senator Williams wondered if the rates were uniform and the modification factor caused the variance.

Mr. Bradshaw said he had a policy in force for the past seven years, with no accidents, so he did not feel the modification factor was the cause.

Closing by Sponsor: Senator Rasmussen suggested holding the bill pending printing of the fiscal note, and information needed from the Workers' Compensation Division. With that, he said, "I close."

DISPOSITION OF SENATE BILL 153

Discussion: Executive action at a later date.

business. Guides are not permanent employees, they are hired as the need arises. Under those circumstances, guides may work for a number of employers each year." (See Exhibit #1).

Bob Butler amplified the previous testimony. He also pointed out that guides operated out of a pool and had their own vehicles and equipment. He said, "Guides do not fit the description of employee." (See Exhibit #2).

Paul Roos pointed out three main points of need, for fairness within the proposed legislation.

Historically, Montana float fish outfitters had used guides on an independent contract basis. When outfitters needed an occasional guide, they hired and paid the guide an agreed fee for that specific task. Roos said the felt guides have been paid as independent contractors in the past.

Secondly, a guide had to make his own operational decisions within a flexible, unset time frame. Guides also had to provide for the expectations of each client or he would not stay in business.

His third concern was the confusion within their industry regarding regulations. The Department of Labor and Industry did not uniformly interpret or enforce rules identifying guides as employees or independent contractors. Roos said, "This legislation will enable a guide's job description to legitimately determine whether or not he or she is an employee or an independent contractor. (See Exhibit #3).

Stan Bradshaw said he worked as a guide for a variety of outfitters. He stated, his work style was as Roos had described. Bradshaw also stated he owned his own equipment and was responsible for his own decisions concerning his clients.

Bradshaw submitted testimony (See Exhibit #4 - Attachment B) regarding his refusal for an exemption from Workers' Compensation as an independent Contractor. Language within Fish, Wildlife and Parks statutes described guides as employees of outfitters. The Workers' Compensation policy was to use this language, and therefore, classified a guide as an employee.

He said it was not the intent of SB 153 to characterize all guides as contractors. It simply offered an area

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

DATE 1/20/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR DARRYL MEYER	✓		
SENATOR PAUL BOYLAN			✓
SENATOR JERRY NOBLE	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM HAGER	✓		
SENATOR HARRY MC LANE	✓		
SENATOR CECIL WEEDING	✓		
SENATOR JOHN "J.D." LYNCH	✓		
SENATOR GENE THAYER	✓		

Each day attach to minutes.

NAME: Jack D Hutchison

BILL NO. SB153
DATE: 1/20/89

ADDRESS: P O Box 387 Sheridan MT

PHONE: 842 5868

REPRESENTING WHOM? Fishing & Hunting Outfitters Assn. of MT

APPEARING ON WHICH PROPOSAL: SB 153

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENT: This bill would bring the law more in
line with the actual working situation. The
bill returns to the existing law of 1988

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Bob Butler DATE 1/20 BILL NO. SB 153

ADDRESS: Box 303, Twin Bridges, MT, 59754

PHONE: 406-684-5773

REPRESENTING WHOM? Butler Outfitting Co

APPEARING ON WHICH PROPOSAL: SB 153

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENT:
Guides Viewed as independent
contractors.

EXHIBIT NO. 3
DATE 1/20/89

NAME: Paul J. Roos

DATE: NO. 58153

ADDRESS: 1630 Leslie Helena MT 59601

PHONE: 442-5489 H 442-4101 W

REPRESENTING WHOM? Self

APPEARING ON WHICH PROPOSAL: 58153

DO YOU: SUPPORT? ☒ AMEND? ☐ OPPOSE? ☐

COMMENT: see Exhibit #3

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Roos

TESTIMONY ON SB 153

Paul S. Roos
1630 Leslie
Helena, Mt 59601
442-5489

January 20, 1989

I would like to make three main points regarding the need and fairness of this proposed legislation.

1. Historically, Montana's float fishing outfitters have operated since at least right after World War II using guides as independent contractors.

a. An outfitter would need an occasional guide and pay the guide an agreed upon amount to take a client fishing. This has been going on since the 1940's.

b. Personally, in the late sixties as a guide I was paid as an independent contractor, and since 1970 we have used guides as independent contractors.

2. The nature of the business demands guides who fit the criteria of an independent contractor and who do not seem to fit the definition of an employee.

a. Hours are flexible and determined by the guide and the clients in most cases.

b. The guide by the nature of the job must be responsible to make decisions regarding when, where, and how the job must be done.

c. A guide knows that his job is to provide the client with an enjoyable day. The job description to accomplish this will vary from day to day and client to client.

d. Many if not most guides own their own equipment. In order for a guide to be truly professional, he or she must spend a lot of time on the river. It is a professional guide's business to know what's going on. He needs to own his own equipment in order to have access to day to day river conditions.

e. In our industry day to day demands as to the number of guides an outfitter needs fluctuates greatly. Therefore, it makes sense for guides to contract to different outfitters on a demand basis.

PAUL ROOS
OUTFITTERS



1120187

SB153

3. It has been my personal experience through the last few years in dealing with the issue of whether guides are employees or independent contractors that there is mass confusion and anxiety in the industry regarding this issue. There is no uniformity in interpretation or enforcement of Department of Labor and Industry regulations regarding floating/fishing outfitters. This legislation will enable a guide's job description to legitimately determine whether or not he or she is an employee or an independent contractor.

(This sheet to be used by those testifying on a bill.)

SENATE BUSINESS & INDUSTRY

EXHIBIT NO.

4

DATE

1/20/89

DATE

BILL NO.

SB 153

NAME:

Stan Bradshaw

ADDRESS:

824 9th, Helene

PHONE:

443-4171

REPRESENTING WHOM?

Self

APPEARING ON WHICH PROPOSAL:

S.B. 153

DO YOU:

SUPPORT?



AMEND?

OPPOSE?

COMMENT:

See introduced testimony
Exhibit 4

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

Testimony of Stan Bradshaw
January 20, 1989

Mr. Chairman and members of the committee, my name is Stan Bradshaw. Among other things, I work in the summer as a float fishing guide. I wish to testify in support of Senate Bill 153.

S.B. 153 seeks to amend language in the outfitters statute (section 37-47-301 et seq. MCA) which characterizes professional guides as "employees". The amendment adds language to the definition of "professional guide" which recognizes that a guide may also be an independent contractor.

Prior to the summer of 1988, the Workers Compensation Division apparently recognized that, in certain circumstances, guides could be considered independent contractors by certifying a number of guides as independent contractors (See attachment A). As a result, outfitters did not have to pay workers compensation premiums for those guides who were independent contractors.

In June, 1988 the Workers Compensation Division notified both outfitters and guides who applied for certification as independent contractors that, in part because of the in the laws "pertaining to Fish, Wildlife and Parks," (See attachment B). guides could not be considered independent contractors. The only law addressing this that was ever a Fish, Wildlife and Parks statute was the outfitter statute, which defined guides as employees.

This interpretation causes considerable difficulty for outfitters. The nature of the float-fishing outfitting business is one of fluctuation. Trips booked are most often day trips and are likely to be booked at any time. The numbers of clients can vary wildly. One day, an outfitter may have a party of four; the next he may have twelve people. Accordingly, the number of guides needed can fluctuate wildly. It is very difficult, if not impossible for an outfitter to keep a full complement of guides employed all the time. As a result, there are many float guides who have their own boat and who work for any number of outfitters as they are needed.

For example, I guided for at least three outfitters during the summer. I made a point of communicating to those outfitters that I was available on an as-needed basis to guide. I had my own equipment and own transportation. When I am on the river with the client, I am completely outside the control of the outfitter. He does not direct me where to fish, what flies to use, or what methods to use. As an independent contractor, those are all my decisions to make. Arguably, at least, these things bring me under the criteria of independent contractor.

It is not the intent of S.B. 153 to characterize all guides as independent contractors. S.B. 153 simply removes an artificial

constraint to the recognition of certain guides as independent contractors. If a guide meets the workers compensation criteria defining an independent contractor, he should be so recognized. If he does not, he should be treated as an employee. S.B. 153 simply allows the latitude for that recognition when it is appropriate.

I urge your support of S.B. 153.



STATE OF MONTANA

HELENA, MONTANA 59601

July 8, 1987

Jim VanMeter
Box 358
Clancy MT 59634

Re: Independent Contractor Exemption

Dear Mr. VanMeter:

Your application for exemption from coverage under the Workers' Compensation and Occupational Disease Act as an independent contractor has been approved in accordance with Section 39-71-401 (3) MCA, and ARM 24.29.706. This exemption is only recognized in the state of Montana.

This exemption from coverage under the Workers' Compensation and Occupational Disease Act applies only to you as an individual holding yourself out to the general public to be an independent contractor, going business as J VanMeter, Guide and does not include any employees you may hire. This exemption will be effective from 7/8/87 to 7/7/88 unless sooner cancelled upon your written request or otherwise by the Workers' Compensation Division.

Sincerely,

Karen Doig
Policy Compliance Investigator
Insurance Compliance Bureau

KD/cl

Attachment A

DEPARTMENT OF LABOR & INDUSTRY
DIVISION OF WORKERS' COMPENSATION

Ex. # 4
1/20/89
SB 153



TED SCHWINDEN, GOVERNOR

MARGARET "PEG" CONDON BLDG.
5 SO. LAST CHANCE GULCH

STATE OF MONTANA

HELENA, MONTANA 59601

June 27, 1988

TO: Interested Parties

FROM: Hiram Shaw, Chief Insurance Compliance Bureau *HS*

SUBJECT: Fishing & Hunting Outfitters: Responsibilities Under the Workers' Compensation Act

Businesses employing fishing and hunting guides must obtain a workers' compensation policy covering all employees. (Sec. 39-71-401, MCA)

Fishing and hunting guides do not qualify as independent contractors based on laws pertaining to Fish, Wildlife and Parks, Unemployment Insurance and Workers' Compensation.

Family Member Exemption Void: The Montana Supreme Court recently ruled unconstitutional which exempted members of an employer's family dwelling in the employer's household from coverage. Employer's family members must now be covered if paid wages.

Exceptions: There are many variations and exceptions to the general coverage requirements. The best rule of thumb is to assure all employees are covered, even if such employees are only temporary.

For further information about your specific situation and requirements, please call the Division of Workers' Compensation, Insurance Compliance Bureau, Uninsured Employers' Unit (444-6530).

Attachment B



BLACKTAIL RANCH

Wolf Creek, Montana 59648
Phone: 406-235-4330

TAG RITTEL

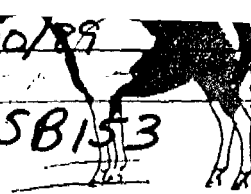
SANDRA RENNER

RANCH VACATIONS • MUSEUM • CAVERN • PAINT HORSES • HUNTING

DATE 1/20/89

BILL NO.

SB153



January 20, 1989

Mr. Chairman Committee members,

My name is Tag Rittel and I represent Montana Outfitter and Guides Assoc.
We highly support S.B. 153. This bill places the professional guide as
a independent contractor which is what he is in most cases. Most guides use
their own equipment; like boats, for floating, trucks, horses, and riding gear.
We feel that they should be classified as Independent contractors.

Sincerely

Tag Rittel
Chairman of Political Action Comm.
Montana Outfitter and Guides Assoc.



Recommendation and Vote: None

DISCUSSION ON SENATE BILL 153

Senator Lynch asked why the department had taken it upon themselves to interpret the law, changing the criteria guides were judged on, prior to this rule making session? He also asked if the department was aware of SB 153, and why no one was here at the hearing? Is there anything the committee should know that they don't know?

Steve Shapiro of the Workers' Compensation Division, apologized for not attending the hearing. He said their tracking system had somehow missed the bill. Consequently, they had missed the hearing. He said he had given Mary McCue written material, which she has handed out to the committee members. (See Exhibit #16)

He said the reason for the blanket determination that guides were not independent contractors was based on the language in Title 37. The language indicated the guides were employees of the outfitters. He stated, although he had not read the bill, he understood the language in the bill said they could be employees, or independent contractors. He said, with its passage, the question would be resolved. He said it would be based on whether they fit the definition of an independent contractor. He stated the bill allowed the possibility of exemption from coverage, if in fact they were independent contractors.

Senator Lynch asked for a clarification of the situation where a guide worked as an independent contractor and was injured. Could the outfitter come back and apply for Workers' Compensation, and cover the injury after the fact? Mr. Shapiro replied the guide wouldn't be covered honestly. He said, the problem would lie with the payroll report coming in at the end of the quarter. He stated there was always the possibility that an extra hand could have been added.

Senator Meyer asked, if a person had been working as an independent contractor for six months and the month following the injury as an employee, would the department investigate? Mr. Shapiro said the department investigated each claim, but investigations varied. In some cases there was a hint of a problem, and some passed through. He said that if the outfitters insisted the guides enroll, then the

department would have documented evidence.

Senator Williams wanted to know where the burden of proof was placed if a guide was hurt and claimed to be an employee? Mr. Shapiro replied, that would be up to the accident investigator. The outfitter may or may not back the story. He said that if the story was not backed up, the guide would have to provide facts and proof to the department.

Senator Williams asked Mr. Shapiro if he felt there were a lot of people trying to get around Workers' Compensation, and was that the reason for much of this legislation? Mr. Shapiro agreed, he said he felt some jobs were offered in a manner to avoid Workers' Compensation. He said he thought the employer may tell his employee he could work as long as he worked as an independent contractor, otherwise, there was no job.

Chairman Thayer wondered if there was a provision where an agreement was made and signed by both parties before the job began? Mr. Shapiro said he felt there was likely a percentage of people waiving workers' compensation, but they could not waive the act. He said, when you looked at the language, a workers status was designated by work details entirely. He stated that if there was evidence of equipment ownership or actual self-employment, the individual would then fall within the self employment tax category. He said one potential problem when waiving workers' compensation was the tendency to seek benefits following an injury.

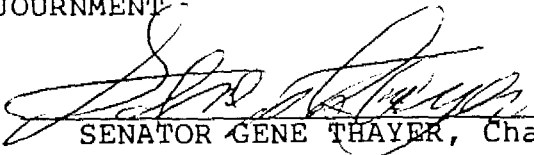
DISPOSITION OF SENATE BILL 153

Chairman Thayer announced that Executive Action would be taken at Wednesday's meeting. He said that was the day requested, by the sponsors.

ADJOURNMENT -

Adjournment At: 12:04 p.m.

GT/ct


SENATOR GENE THAYER, Chairman

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

DATE 1/23/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
<u>SENATOR DARRYL MEYER</u>	✓		
<u>SENATOR PAUL BOYLAN</u>	✓		
<u>SENATOR JERRY NOBLE</u>	✓		
<u>SENATOR BOB WILLIAMS</u>	✓		
<u>SENATOR TOM HAGER</u>	✓		
<u>SENATOR HARRY MC LANE</u>	✓		
<u>SENATOR CECIL WEEDING</u>	✓		
<u>SENATOR JOHN "J.D." LYNCH</u>	✓		
<u>SENATOR GENE THAYER</u>	✓		

Each day attach to minutes.



DEPARTMENT OF LABOR & INDUSTRY

DIVISION OF WORKERS' COMPENSATION

TED SCHWINDEN, GOVERNOR

STATE OF MONTANA

EXHIBIT NO. 16

DATE 1/23/89

BILL NO. SB 153

MARGARET "PEG" CONDON BLDG.
5 SO. LAST CHANCE GULCH

HELENA, MONTANA 59601

June 27, 1988

TO: Interested Parties

FROM: Hiram Shaw, Chief
Insurance Compliance Bureau *HS*

SUBJECT: Fishing & Hunting Outfitters: Responsibilities Under the
Workers' Compensation Act

Businesses employing fishing and hunting guides must obtain a workers' compensation policy covering all employees. (Sec. 39-71-401, MCA)

Fishing and hunting guides do not qualify as independent contractors based on laws pertaining to Fish, Wildlife and Parks, Unemployment Insurance and Workers' Compensation.

Family Member Exemption Void: The Montana Supreme Court recently ruled unconstitutional which exempted members of an employer's family dwelling in the employer's household from coverage. Employer's family members must now be covered if paid wages.

Exceptions: There are many variations and exceptions to the general coverage requirements. The best rule of thumb is to assure all employees are covered, even if such employees are only temporary.

For further information about your specific situation and requirements, please call the Division of Workers' Compensation, Insurance Compliance Bureau, Uninsured Employers' Unit (444-6530).

(8) "Participant" means a person using the services offered by a licensed outfitter or professional guide.

37-47-101. (Effective July 1, 1991) Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "License year" means that period commencing January 1 and ending December 31 of the same year.

(2) "Nonresident" means a person other than a resident.

(3) "Outfitter" means any person, except a person providing services on real property that he owns for the primary pursuit of bona fide agricultural interests, who:

(a) engages in the business of outfitting for hunting or fishing parties, as the term is commonly understood;

(b) for consideration provides any saddle or pack animal or personal service for hunting or fishing parties or camping equipment, vehicles, or other conveyance, except boats, for any person to hunt, trap, capture, take, or kill any game and accompanies such a party or person on an expedition for any of these purposes;

(c) for consideration furnishes a boat or other floating craft and accompanies any person for the purpose of catching fish; or

(d) for consideration aids or assists any person in locating or pursuing any game animal.

(4) "Outfitters' council" means the Montana outfitters' council provided for in 2-15-1883.

(5) "Professional guide" means a person who is an employee of an outfitter and who furnishes only personal guiding services in assisting a person to hunt or take game animals or fish and who does not furnish any facilities, transportation, or equipment.

(6) "Resident" means a person who qualifies for a resident Montana hunting or fishing license under 87-2-102.

(7) "Participant" means a person using the services offered by a license outfitter or professional guide.

History: Ap. p. Sec. 1, Ch. 221, L. 1971; amd. Sec. 37, Ch. 511, L. 1973; amd. Sec. 17, Ch. 9, L. 1977; Sec. 26-908, R.C.M. 1947; Ap. p. Sec. 69, Ch. 173, L. 1917; re-en. Sec. 3748, R.C.M. 1921; re-en. Sec. 3748, R.C.M. 1935; amd. Sec. 4, Ch. 173, L. 1949; amd. Sec. 3, Ch. 184, L. 1951; amd. Sec. 2, Ch. 223, L. 1955; amd. Sec. 1, Ch. 541, L. 1975; amd. Sec. 16, Ch. 9, L. 1977; Sec. 26-904, R.C.M. 1947; R.C.M. 1947, 26-904(1), 26-908; amd. Sec. 1, Ch. 170, L. 1981; amd. Sec. 2, Ch. 545, L. 1981; amd. Sec. 1, Ch. 410, L. 1983; amd. Sec. 2, Ch. 528, L. 1987; Sec. 87-4-101, MCA 1985; reds. 37-47-101 by Sec. 11, Ch. 528, L. 1987.

Compiler's Comments

1987 Amendment: In introductory clause substituted "chapter" for "part"; inserted (1) and (2); deleted former (4) that read: "(4) 'Outfitters' council' means the Montana outfitters' council provided for in 2-15-3403"; and made minor grammatical change.

Transfer of Agency: Section 10, Ch. 528, L. 1987, provided: "Transfer of agency — name change — duties transferred. (1) The Montana outfitters' council is transferred to the department of commerce and is renamed the board of outfitters.

(2) The authority and functions of the department of fish, wildlife, and parks regarding

licensing of outfitters and guides are transferred to the board of outfitters, and any reference in 87-4-122, 87-4-124, 87-4-125, 87-4-129, 87-4-131, and 87-4-143 to the department of fish, wildlife, and parks or to the department or director, meaning the department of fish, wildlife, and parks or the director of that department, is changed to the board, meaning the board of outfitters."

Cross-References

Outfitter to perform all activities listed under definition or a more restrictive special license, 37-47-308.

37-47-303

PROFESSIONS AND OCCUPATIONS

578

person may apply for or hold an outfitter's license during any period of time in which a sentence has been deferred or suspended for a felony.

(10) have substantially complied with all board regulations and state and federal laws concerning outfitters and professional guides, if the applicant has previously held a license as an outfitter or professional guide.

History: En. Sec. 8, Ch. 221, L. 1971; amd. Sec. 13, Ch. 94, L. 1973; amd. Sec. 3, Ch. 541, L. 1975; amd. Sec. 21, Ch. 9, L. 1977; amd. Sec. 13, Ch. 417, L. 1977; R.C.M. 1947, 26-915(3)(a) thru (3)(k); amd. Sec. 9, Ch. 545, L. 1981; amd. Sec. 8, Ch. 239, L. 1983; amd. Sec. 10, Ch. 528, L. 1987; Sec. 87-4-122, MCA 1985; reds. 37-47-302 by Sec. 11, Ch. 528, L. 1987.

Compiler's Comments

1987 Amendment: In introductory clause, "board" for "department".
after "shall", deleted "in the opinion of the

37-47-303. Professional guide's qualifications. (1) An applicant for a professional guide's license shall meet the following requirements:

(a) be a person of at least 18 years of age who is physically capable and mentally competent to perform his duties as a professional guide;

(b) be endorsed and recommended by an outfitter with a valid license;

(c) have not been convicted or forfeited bond of \$100 or more on more than one violation of the fish and game laws or applicable regulations of the state of Montana or the United States within the past 5 years;

(d) have not committed any gross negligent act or misconduct while acting as a guide that caused an accident or injury to person or property of any client of an outfitter during the license year immediately preceding that for which the application is made;

(e) have not, at any time, pleaded guilty to or been adjudged by a court guilty of a felony, unless civil rights have been restored pursuant to law. No person may apply for or hold a professional guide's license during any period of time in which a sentence has been deferred or suspended for a felony.

(2) A professional guide shall have been issued a valid wildlife conservation license.

History: En. Sec. 8, Ch. 221, L. 1971; amd. Sec. 13, Ch. 94, L. 1973; amd. Sec. 3, Ch. 541, L. 1975; amd. Sec. 21, Ch. 9, L. 1977; amd. Sec. 13, Ch. 417, L. 1977; R.C.M. 1947, 26-915(4), (5); amd. Sec. 10, Ch. 545, L. 1981; Sec. 87-4-123, MCA 1985; reds. 37-47-303 by Sec. 11, Ch. 528, L. 1987.

37-47-304. Application. (1) Each applicant for an outfitter's or professional guide's license shall make application for license upon a form to be prescribed and furnished by the board which shall include:

(a) the applicant's full name, residence, address, conservation license number, driver's license number, birth date, physical description, and telephone number;

(b) the address of his principal place of business in the state of Montana;

(c) the amount and kind of property and equipment owned and used in the outfitting business of the applicant, if an outfitter's license application is involved;

(d) the experience of the applicant, including years of experience as an outfitter or professional guide, knowledge of areas in which he has operated and intends to operate, and ability to cope with weather conditions and terrain;

(e) a signed statement of the licensed outfitter by whom the professional guide is to be employed that the professional guide is in fact to be employed

by such outfitter and stating that the outfitter recommends the applicant for his qualifications;

(f) an affidavit by the outfitter to the board that the equipment listed on the application is in fact owned or leased by the applicant, is in good operating condition, and is sufficient and satisfactory for the services advertised or contemplated to be performed by such applicant;

(g) a statement of the maximum number of guests to be taken at any one time;

(h) the written approval of the appropriate agency or landowner on whose lands he will establish hunting camps.

(2) Applications for outfitter's license shall be in the name of an individual person only. Applications involving corporations or partnerships shall be made by one individual person who qualifies under the provisions of this part; any license issued pursuant thereto shall be in the name of that person; and the license shall specifically state that the same is issued for the use and benefit of the named corporation or partnership involved. Any revocation or suspension of such a license is binding upon the individual person and the partnership or corporation for the use and benefit of which the license was originally issued.

(3) Application shall be made to and filed with the board.

(4) Only one application for an outfitter's or professional guide's license may be made in any one license year. If any application is denied, subsequent applications by the same applicant for the license year involved are void, except as provided in 37-47-308.

History: En. Sec. 8, Ch. 201, L. 1971; amd. Sec. 13, Ch. 94, L. 1973; amd. Sec. 3, Ch. 541, L. 1975; amd. Sec. 21, Ch. 9, L. 1977; amd. Sec. 13, Ch. 417, L. 1977; R.C.M. 1947, 26-915(1), (2), (13); amd. Sec. 11, Ch. 522, L. 1981; amd. Sec. 10, Ch. 528, L. 1987; Sec. 87-4-124, MCA 1985; reds. 37-47-304 by Sec. 11, Ch. 528, L. 1987.

Compiler's Comments

1987 Amendment: In introductory clause substituted "board" for "department"; and in (1)(f) and (3) substituted "board" for "director".

37-47-305. Outfitter's examination. Each applicant for an outfitter's license shall pass a standard examination administered by the board or its agent, which examination shall require general and sufficient knowledge displaying and indicating ability to perform the services contemplated with efficiency and with safety to the health and welfare of persons employing such services. The examination shall test the applicant's knowledge of subjects which shall apply to the type of license applied for in the following subjects:

- (1) federal and state fish and game laws and regulations;
- (2) practical woodsmanship;
- (3) general knowledge of big game;
- (4) field preparation of trophies;
- (5) care of game meat;
- (6) use of outfitter's gear as listed on the application;
- (7) knowledge of area and terrain;
- (8) knowledge of firearms;
- (9) federal and state regulations as applicable to outfitting;
- (10) first aid;
- (11) boat safety;

board shall issue either of the following licenses, depending upon its determination of the applicant's ability and the service that the applicant can perform with the equipment listed on his application:

(a) a general license authorizing him to perform all the functions of an outfitter as that term is defined in 37-47-101; or

(b) a special license authorizing him to perform only the function of outfitting listed on the license.

(2) The license shall be in the form prescribed and shall be valid for the licensing year in which issued.

(3) If the application is denied, the board shall notify the applicant in writing of the reasons for the denial, and if the reasons are corrected, a license shall be issued upon reapplication thereof.

History: En. Sec. 9, Ch. 221, L. 1971; amd. Sec. 4, Ch. 541, L. 1975; amd. Sec. 22, Ch. 9, L. 1977; R.C.M. 1947, 26-916(1); amd. Sec. 10, Ch. 528, L. 1987; Sec. 87-4-129, MCA 1985; redes. 37-47-308 by Sec. 11, Ch. 528, L. 1987.

Compiler's Comments

1987 Amendment: In (1) substituted "board" for "director" and "its determination" for "his determination"; and in (3) substituted "board" for "director".

Cross-References

Limit on application for an outfitter's or guide's license, 37-47-304.

37-47-309. Professional guide's license. (1) For the purposes of this part, a person may serve as a professional guide under his employer's license, after submitting his application with the proper license fee, until the license is issued or denied.

(2) To be valid, a professional guide's license must bear the signature and outfitter's license number of the endorsing outfitter and is valid only while the holder of such license is employed by the endorsing outfitter.

History: En. Sec. 9, Ch. 221, L. 1971; amd. Sec. 4, Ch. 541, L. 1975; amd. Sec. 22, Ch. 9, L. 1977; R.C.M. 1947, 26-916(2), (3); amd. Sec. 16, Ch. 545, L. 1981; Sec. 87-4-130, MCA 1985; redes. 37-47-309 by Sec. 11, Ch. 528, L. 1987.

37-47-310. Transfer or amendment of outfitter's license. (1) No outfitter's license may be transferred during any license year.

(2) An individual person may, upon proper showing, have his outfitter's license amended to indicate that he is holding the license for the use and benefit of a named partnership or corporation.

(3) Subject to approval by the board, the immediate members of the family of a deceased licensed outfitter may continue to outfit for the deceased outfitter's unexpired license year or until the heirs or personal representative of the estate sells the outfitting business or obtains relicensure therefor.

History: En. Sec. 9, Ch. 221, L. 1971; amd. Sec. 4, Ch. 541, L. 1975; amd. Sec. 22, Ch. 9, L. 1977; R.C.M. 1947, 26-916(4); amd. Sec. 17, Ch. 545, L. 1981; amd. Sec. 10, Ch. 528, L. 1987; Sec. 87-4-131, MCA 1985; redes. 37-47-310 by Sec. 11, Ch. 528, L. 1987.

Compiler's Comments

1987 Amendment: In (3) substituted "board" for "director".

37-47-311. Limit one license. No person may hold more than one outfitter's license either for his own benefit or for the use and benefit of a partnership or corporation, nor may the name of any partnership or corporation appear on more than one current outfitter's license.

History: En. Sec. 9, Ch. 221, L. 1971; amd. Sec. 4, Ch. 541, L. 1975; amd. Sec. 22, Ch. 9, L. 1977; R.C.M. 1947, 26-916(5); Sec. 87-4-132, MCA 1985; redes. 37-47-311 by Sec. 11, Ch. 528, L. 1987.

DEPARTMENT

UNEMPLOYMENT INSURANCE DIVISION

WORKERS'
COMPENSATION

TED SCHWINDEN, GOVERNOR

STATE OF MONTANA

P.O. Box 1728
1327 Lockey
Helena, MT 59624Benefits (406) 444-3783
Contributions (406) 444-3834CERTIFIED MAIL

January 19, 1988

Mr. Norman H. Grosfield
Utick & Grosfield, Attorneys at Law
P.O. Box 512
Helena, MT 59624Re: Paul Roos Outfitting
S-981

Dear Mr. Grosfield:

As you know, the Department of Labor and Industry has been investigating the employment relationship between Paul Roos Outfitting and the guides performing services for the company.

As Paul Roos Outfitting considers the guides to be independent contractors, a Worker Relationship Questionnaire was submitted by the company, a contract used with the guides and a copy of an Independent Contractor Exemption from the Workers' Compensation Division.

Unemployment Insurance is not bound by the decisions of the Workers' Compensation Division. Workers' Compensation does not investigate the actual working relationship but depends on the contract of hire for their determination. While Workers' Compensation may have reviewed the contract and felt it could be an independent relationship, the contract does not contain all the aspects of the employment relationship. Therefore, the Unemployment Insurance Division investigated further and I have found an employment relationship to exist. My determination is based on the above documents and sections of Montana Code Annotated which pertain to Fish, Wildlife and Parks and Unemployment Insurance.

Section 87-4-101. Definitions. -

(5) "Professional guide" means a person who is an employee of an outfitter and who furnishes only personal guiding services in assisting a person to hunt or take game animals or fish and who does not furnish any facilities, transportation, or equipment.

UNINSURED EMPLOYERS FUND JAN 21 '88

Section 87-4-122. Outfitters qualifications.

(2) own or hold under written lease or represent a company, corporation, or partnership who owns or holds under written lease the equipment and facilities as are necessary to provide the services advertised, contracted for, or agreed upon between the outfitter and his clients.

Section 87-4-130. Professional guide's license.

(2) To be valid, a professional guide's license must bear the signature and outfitter's license number of the endorsing outfitter and is valid only while the holder of such license is employed by the endorsing outfitter.

Section 39-51-201 (14). General Definitions.

(14) "Independent Contractor" means an individual who renders service in the course of an occupation and;

- (a) has been and will continue to be free from control or direction over the performance of such services, both under his contract and in fact; and
- (b) is engaged in an independently established trade, occupation, profession, or business.

This statute clearly establishes a two-part test which must be met before an individual can be classified as an independent contractor. The absence of any factor results in subject employment.

The determination on the employment relationship is based on applying each "test" to the findings as follows:

Subsection (a) -

Under subsection (a), the individual shall be free from direction and control over the performance of his services. The outfitter is clearly given control of the guide by the statement above the outfitter's signature on the guide's license which reads "...and that I am responsible for his (the guide's) conduct and performance in field and camp."

The courts have held that it the right of control, not merely the fact of control, that is the determining factor. Where the right to control exists, the fact of whether the employer finds it necessary to exercise such control may be unnecessary due to the nature of the work and the expertise of the worker. Since the guides are no doubt skilled at their profession, constant supervision would be unnecessary. The outfitter would retain the right to exert direction and control to the

extent necessary to ensure the satisfactory conduct of his business and to protect the general welfare of his clients. ^{WORKERS' COMPENSATION}

The fact that an outfitter must sign a guide's license stating that he will employ the guide is a further indication on control.

According to the definition of a professional guide, they cannot supply facilities, transportation or equipment. Further, under the outfitter's qualifications, equipment and facilities must be provided. The outfitter stated that the guides supplied their own equipment. To be in conformity with the Fish, Wildlife and Parks law, the outfitter must supply the equipment and by doing such, this would be a further indication of control over the worker.

The outfitter has the right to terminate the working relationship at any time. It might be difficult to reach the guide but the right to terminate the relationship is still existent. By signing the guide's license, the outfitter is stating that he is responsible for the guide's conduct and performance in the field and camp. This indicates that if his conduct or performance was not appropriate in field or camp, the outfitter could take measures to correct it; termination being one possibility.

The outfitter books reservations and makes the arrangements with the clients. By doing this, the outfitter has control of the guide by determining which days he must hunt, the number of clients, and any other arrangements the client has requested that the guide be responsible for.

It was noted on the Worker Relationship Questionnaire that the guides are given "limited training as to the policies of the firm." This would indicate that the firm had control over the worker and the methods the worker could use.

From the information above, we conclude the requirement of subsection (a) has not been met with regard to services performed by the guides.

Subsection (b) -

The evidence submitted does not show the services performed by the guides are that of an independently established business. I have found:

The guide cannot have an independently established business. He cannot set up a business on his own as he

would have to be a licensed outfitter to do this. The WORKERS' COMPENSATION guide cannot legally book hunts, take people on hunts, or deal with the customer without being an outfitter.

This evidence concludes that the requirements in subsection (b) cannot be met.

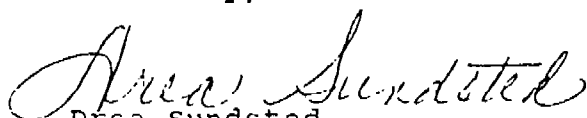
I would also like to note that the Fish, Wildlife and Parks section of Montana Codes Annotated refers constantly to the guide being employed by the outfitter. Also, on the Application for Professional Guide's License under the section of Endorsement of Employing Outfitter, it states "I will employ this applicant as a professional guide..."

In the case of outfitting for fishing trips where the guides provide the majority of the large equipment (rafts, transportation), the Unemployment Insurance Division has been allowing the outfitting business to take a seventy-five percent equipment rental deduction from the reportable wages of the guides.

Based on the foregoing information, it is the determination of the Unemployment Insurance Division of Montana that the services performed by the guides are in covered employment. All wages paid to the guides are reportable to and taxable by this Division.

Should you have any information which would alter this determination, please submit it in writing within 10 days from the date of this letter. If we have not received a rebuttal from you within 10 days, this determination will become final.

Sincerely,


Drea Sundsted
Status Unit Supervisor

File I.D.4

INDEPENDENT CONTRACTOR SUMMARY

This is a summary of the law regarding independent contractors as seen by the Division of Workers' Compensation. Generally, this status is determined on a case-by-case basis but the law does provide some definitions and guidelines.

The term "independent contractor" is defined at Section 39-71-120, MCA, as:

"An 'independent contractor is one who renders service in the course of an occupation and:

- "(1) has been and will continue to be free from control or direction over the performance of the service, both under his contract and in fact; and
- "(2) is engaged in an independently established trade, occupation, profession, or business."

One of the basic cases in defining the existence of an independent contractor is the case of Sharp v. Hoerner-Waldorf Corp., and Aetna Casualty, 178 Mont. 419, 584 P.2d 1298 (1978). In this case the Court set out four factors regarding the right of control for consideration in determining the independent contractor status. Those factors are: (1) direct evidence of the right or exercise of control over performance of the services; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire. The Court further discussed these factors in Solheim v. Tom Davis Ranch and State Fund, 41 St.Rep. 326 (1984). In this case, the Court explained first that the evidence of right or exercise of control would indicate independent contractor status where the worker would substantially control the performance of his services and the hiring party would only give general directions as to the result expected. The method of payment factor would indicate independent contractor status where payment was made upon completion of the entire contract or large segments thereof, rather than on a time basis. The factor of furnishing of equipment indicates an employment relationship when an employer furnishes most of the valuable equipment to complete the job. However, the Court noted that where the worker supplies most of the valuable equipment to perform the job, it does not necessarily negate the employee status. Finally, the factor of the right to fire indicates the absolute power of control over an employee. Where a hiring agent can terminate a work relationship without liability for work to be performed on the balance of the project, then an independent contractor relationship is not established. If there were a contractual relationship, the worker would have a cause of action for breach of contract which an employee would not have. The case of Carlson v. Cain and Billings Gazette, 40 St.Rep. 865, 664 P.2d 913 (1983) also thoroughly discussed the foregoing factors.

PS //

It should be noted that not one of the factors discussed above is alone determinative of the issue. All of these factors must be weighed and balanced with the statutory definition in order to determine the independent contractor status. Obviously, some work relationships are more susceptible to prospective determinations of this status than are others.

We see four alternatives for an employer in dealing with workers assumed to be independent contractors. Those are: (1) do nothing, (2) require insurance by the contractor, (3) require an exemption for the contractor, (4) insure the contractor by rider on the employer's own policy. Of these alternatives, the first, "do nothing," is the least desirable. If at the time of an injury, a worker is determined to be an independent contractor, he will have to suffer his own uninsured loss but might perhaps find a cause of action in negligence against the employer. If at the time of the injury he were determined to be an employee, the insurer would have to pick up his claim and charge the employer for unpaid premiums during the entire period of employment. Given the decisions of the Workers' Compensation Court and Supreme Court in recent years, it is reasonably certain that where the point is at issue, the Court will do all it can to find that the injured worker is an employee so he may have the benefits of insurance coverage.

The other three alternatives should be acceptable means of dealing with an employer's risk, but policy considerations of the employer may establish one means as more desirable than the others. An employer might require that all independent contractors who wish to do business with it either obtain their own insurance coverage or an exemption, which, of course, would be at their expense. The employer may want to provide coverage through a rider on its own policy, which would designate this coverage as being for independent contractors only. This in fact might be the easiest method for both employers and insurers to administer, as it would eliminate the need for large numbers of applications for insurance or exemption from each contractor and the effort in verifying the same. Establishing a rider on an employer's policy, as in related matters, the Division has at all times maintained that such procedures are for workers' compensation purposes only and have no relation to determinations of status made for unemployment coverage, tax assessment and similar matters. It may be that if the issue arises, someone will point to this coverage as an indication of employee status, but the employer, of course, will point out that it was specifically designated as convenience coverage for independent contractors, along with other countervailing factors, including that the person actually functioned as an independent contractor.

The Legislature enacted the exemption from coverage for independent contractors in 1983. See the Division rules which become effective in July, 1984, for details on the requirements for obtaining this exemption.

"I would like to ask the committee to support SB 186.....It's worth a gamble, even if we don't get any extra money, just to get the \$157,000,000 unfunded liability off the state of Montana's hands. I think that would be quite a plus."

DISPOSITION OF SENATE BILL 186

Executive action will be taken at a later date.

DISPOSITION OF SENATE BILL 153

Discussion: Chairman Thayer said, "This bill was held at the request of Senator Lynch. There were also some question raised concerning amendments, and fiscal note." Written testimony received since the hearing on SB 153 was presented. (See Exhibit #9)

Senator Williams said he had asked Stan Bradshaw for some information concerning the wide variation of rates, on some of the outfitters. He said, "I appreciate his bringing them. The rate for the outfitters, guides, and drivers is \$27.17 a hundred. The rate for the summer outfitter and guides, the ones that are just fishing guides,....get by for \$10.82." (See Exhibit #8)

Senator Lynch said "I don't think any amendments are necessary."

Recommendation and Vote: Senator Lynch made a motion SB 153 DO PASS Senator Weeding seconded it.

Discussion: Mary McCue said, "One of the outfitters had raised a question concerning a technical problem. At one point we talk about 'board' and one place we talk about 'council'. It will become a council, by law, in 1991, so that doesn't present a problem."

Senator Weeding said, I think the problem had arisen came about when the Workers' Compensation Division's interpreted the law. When they said a guide was an employee."

Senator Thayer stated, "I think some guides, in the past, have worked as contract labor. Now, because of changes in the law, they are considered employees."

Mary McCue explained, "The law has been transferred to Title 37 of the Department of Commerce. However, I don't think the language was changed. The word 'employee' has been there all the time, but just hadn't been applied in quite that manner."

Chairman Weeding said, "I think they picked up on the language on page 6, and used it in determining the employee status."

Chairman Thayer asked Mr. Bradshaw, "Why was the word 'retained' used? I would think the word 'contracted' would be better. Will this create a problem. The purpose of the amendment wasn't to opt out all employees, just the independent contractors."

Mr. Bradshaw said, "I don't think it would. The thought, I think, was that 'retained' implies more than simply having hired somebody as an employee. To retain a contract seemed more encompassing."

Senator Weeding said, "I think the word 'retained' probably does encompass part time contracted help." contracted help.

Mary McCue said, "I agree, and I think that wherever 'retained' is used, we should expand the language to include 'employed or retained as an independent contractor'."

Senator Lynch said, "I withdraw my motion." Senator Weeding added, "I'll withdraw my second."

Amendments and Votes: Senator Weeding Moved the Amendment. Senator Lynch seconded the motion. The Amendment Carried Unanimously. (See Exhibit #7)

Recommendation and Vote: Senator Lynch moved SB 153 DO PASS AS AMENDED. Senator Weeding seconded the motion. The motion Carried, with Senator Williams opposing.

DISPOSITION OF SENATE BILL 191

Discussion: Chairman Thayer said he was not satisfied with the bill when it was passed out of committee. "We didn't really solve the problem created when somebody does assume someone else's business name. Even with the passage of this bill, if that happens again, the Secretary of State's Office still cannot do anything

ROLL CALL

BUSINESS & INDUSTRY COMMITTEE

DATE 1/25/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
<u>SENATOR DARRYL MEYER</u>	✓		
<u>SENATOR PAUL BOYLAN</u>	✓		
<u>SENATOR JERRY NOBLE</u>	✓		
<u>SENATOR BOB WILLIAMS</u>	✓		
<u>SENATOR TOM HAGER</u>	✓		
<u>SENATOR HARRY MC LANE</u>	✓		
<u>SENATOR CECIL WEEDING</u>	✓		
<u>SENATOR JOHN "J.D." LYNCH</u>	✓		
<u>SENATOR GENE THAYER</u>	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

January 25, 1989

MR. PRESIDENT:

We, your committee on Business and Industry, having had under consideration SB 153 (first reading copy -- white), respectfully report that SB 153 be amended and as so amended do pass:

1. Page 6, line 10.

Following: "retained"

Insert: "as an independent contractor"

2. Page 6, line 12.

Following: "retained"

Insert: "as an independent contractor"

3. Page 7, line 25.

Following: "retained"

Insert: "as an independent contractor"

AND AS AMENDED DO PASS

Signed: _____
Gene Thayer, Chairman

W.D. 11/26/89
9:27
a.m.

Amendments to Senate Bill No. 153
First Reading Copy

For the Committee on Business & Industry

January 25, 1989
Prepared by Mary McCue

1. Page 6, line 10.
Following: "retained"
Insert: "as an independent contractor"

2. Page 6, line 12.
Following: "retained"
Insert: "as an independent contractor"

3. Page 7, line 25.
Following: "retained"
Insert: "as an independent contractor"



STATE COMPENSATION INSURANCE FUND
DIVISION OF WORKERS' COMPENSATION
P.O. BOX 4759
HELENA, MONTANA 59604-4759

SENATE BUSINESS & INDUSTRY
EXHIBIT NO. 8
DATE 1/25/89
BILL NO. SB 153

POLICY SERVICES: (406) 444-6440

CLAIMS: (406) 444-6500

MEDICAL PAYMENTS: (406) 444-6460
Stan Brundage

153

January 23, 1989

SCIF Rates for Guides

Code 8279 - Outfitters and Guides and Drivers

07/01/86	Rate	\$ 17.96 per \$100
01/01/87	Rate	\$ 27.17 per \$100
07/01/87	Rate	\$ 27.17 per \$100

07/01/88 established separate codes.

Code 8280 - Outfitters and Guides

07/01/88 Rate \$ 27.17 per \$100
Applies to all types of hunting guides and outfitters.

Code 9180 - Amusement Device Operation NOC

07/01/88 Rate \$ 10.82 per \$100
Applies to fishing guides on streams or lakes.

Businesses involved in both hunting and fishing guides operations
would be assigned Code 8280 only.

High Plains Outfitters

MIKE BAY • 31 DIVISION ST. • HELENA, MONTANA 59601 • (406) 442-9671

DATE 1/25/89
BILL NO. SB 153

January 25, 1989
SB 153

TO: Business and Industry Committee

I am writing this testimony in support of SB 153 introduced by Tom Rasmussen.

In 1982, I started my outfitting business. My first wages were paid out in 1983. I paid my help as independent contractors as I had been paid as a guide. In 1985, I was contacted by Worker's Compensation and after much to do, was ordered by pay insurance on all back wages, including penalties and interest. It nearly broke my young business. For 1986, everyone was treated as an employee. My insurance agent informed me in 1987 that Worker's Compensation had two different class codes for outfitter's employees; one for hunting guides and the other for "amusement device operators" which included fishing guides. I contacted Worker's Compensation and was given credit for the approximate 15% overcharge ... no penalties or interest.

Presently, I have two types of guides; those who are employees and independent contractors who are also outfitters. Each of these guides carry out the same duties. Because of my extra expense, employee guides have a take home check approximately 35% smaller than the independent contractor.

I feel it is unfair for the guide who provides his own equipment and has legitimate business expenses to be treated as an employee. Many guides work for different outfitters. Outfitters do not supply guides with a place to work. Clients are placed in the hands of the guide who can start fishing when and where he sees fit. The outfitter has no control over the guide after they are assigned their fishermen. These people are true independent contractors.

Please pass this bill, as it would be a positive step in bringing guide's salaries in line with their capital outlay.

Thank you

Mike Bay

STATUS SHEET

51st LEGISLATIVE SESSION

HOUSE LABOR AND EMPLOYMENT RELATIONS COMMITTEE

Senate

BILL NUMBER	ENTERED COM. DATE	DATE CON- SIDERED	OUT OF COM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMENDED DATE	DO NOT PASS AS AMENDED DATE	BE CON- CURRED IN DATE	BE NOT CON- CURRED IN DATE	BE CON- CURRED IN AMENDED DATE	BE NOT CONCURR IN AS AMENDE DATE
SB 49	2/21	2/28/89						2/28/89			
" 127	"	✓ 3/2	tabled 3/2								
" 153	2/21	2/28								2/28	
" 156	"	✓ 3/7						✓ 3/7			
" 159	"	✓ "						✓ 3/7			
" 160	"	✓ "	held							✓ 3/14	
" 165	3/4	✓ 3-21-89	tabled 3-22-89								
" 186	"	✓ 3/7	tabled 3-14								
" 202	"	✓ 3/9	tabled 3/9								
" 218	"	✓ "						3/9			
" 235	2/22	✓ 3/21	tabled on 3-22-89								
" 255	2/21	✓ 3/16	tabled on 3/20/89								
" 276	"	✓ 3/9								3/9	
" 278	2/22	✓ "						✓ 3/9			
" 285	2/21	3/14									

Use a separate sheet for Senate Bills, House Bills, and Resolutions.

HEARING ON SB 153

Presentation and Opening Statement by Sponsor:

SEN. RASMUSSEN: This bill deals with a problem that is occurring in the area of the outfitters and guides. As the title says, it is to clarify that an licensed outfitter may retain the services of a professional guide acting as an independent contractor. Current practice has been that guides could be independent contractors as they worked with outfitters. There was a decision just last year that changed this from the workers' comp division and threw it into confusion. This legislation is an attempt to restore the relationship as it was prior to last year and to allow certain guides to be able to function as independent contractors.

We do have an amendment to the bill that one of the proponents will present.

Testifying Proponents and Who They Represent:

STAN BRADSHAW, Floating and Fishing Outfitters Association of Montana and also on his own behalf as a guide.

JACK HUTCHISON, Executive Director for the Floating and Fishing Outfitters Association of Montana.

JO BRUNNER, Lobbyist for Montana Outfitters and Guides Association.

TONY SCHOANEN, self.

PAUL S. ROOS, self.

Proponent Testimony:

STAN BRADSHAW, proponent. As Sen. Rasmussen indicated, prior to 1988, float fishing guides in some instances had been determined by the workers' compensation division to be independent contractors and I submitted earlier some written testimony (attached hereto as Exhibit #1). Attachment "A" to my testimony is a letter to one of those guides indicating their finding that in fact he was an independent contractor. The situation that gives rise to that is that in the float fishing outfitting business, and it was the Float Fishing Outfitting Association who proposed this amendment to the statute, an outfitter will oftentimes have a wildly fluctuating clientele. One day he may have two clients that he needs to float down the river and another day he may have ten. As a result, his demands for guides fluctuates. Out of that reality has arisen the practice of people such as myself of working for a variety of different outfitters. When I went to the Workers' Compensation division last year to get an exemption as an independent

contractor, I was notified by a memorandum that because of the language in the outfitters' statute that characterizes guides as employees, that guides could not, even if they otherwise fit all the definitions of an independent contractor in the workers' comp statute, be considered as independent contractors. The bill is an attempt to allow workers' compensation to consider each guide who applies under the tests that they apply to all other people who seek to be declared independent contractors, without the constraints of statutory language that automatically classifies them as an employee. Now between the senate and its arrival to you today, Rep. Driscoll expressed some concerns that, as written and as before you today, there are some problems with the language. Namely, the amendment that we proposed didn't seem to take the dilemma out of creating a guide as an employee. I have an amendment that I have discussed with Rep. Driscoll that I would like to pass out and I will briefly explain, (attached hereto as Exhibit #2).

If you will look on page 2, line 22, this is sort of the heart of the bill for us, it is the definition of "guide." This would add in that a guide as an independent contractor would have to provide both personal services and facilities, transportation or equipment. The reason for that is if a guide is simply providing personal services and nothing else, it is highly unlikely that he could in good faith be considered as an independent contractor. This language is intended to make sure that at least as this statute discusses guides as independent contractors, those guides have the equipment, etc. that they would have to have as an independent contractor. Even with this in place, it still simply becomes available for workers' compensation to consider whether a guide who claims he is an independent contractor is truly one or not. After this is in place if I, as a guide, apply for the exemption and don't meet the two-part workers' compensation test then I am an employee and the outfitters for whom I work are going to have to pay those workers' compensation premiums. This simply allows that if I can meet that test then I can be granted the exemption. That is the intention of it, not to open up a Pandora's box of workers' comp evaders, but rather to simply deal with the situation that has come up because of the recent interpretation of workers' compensation.

JACK HUTCHISON, proponent. We support SB 153. To summarize our thoughts on it -- it doesn't do anything that hasn't been done before. It was because of the change in the law in the last two years that this situation was created. Prior to that, the statute read that a guide must be endorsed or recommended by an outfitter, that allowed for the option of either employment or independent contractor status. All we are trying to do is correct the wording of the law that went into effect during the last session. Based on that, this is not intended in any way to give carte blanche to an

outfitter to employ independent contractors. It strictly gives them the right of every other business in the state and that is the right to either hire an independent contractor or an employee. (Also submitted written testimony, attached hereto as Exhibit #3).

JO BRUNNER, proponent. The president of the association intended to be here today but he couldn't make it because of the weather. He asks that you consider the Montana Outfitters and Guides Association in support of this bill, including the amendment offered by Mr. Bradshaw.

TONY SCHOANEN, proponent. I have been a long time float fishing guide, this will be my 29th year. Over those years I have had my two sons working in the business. This bill would clarify the fact that both my boys, for example, have their own boats and have all their own equipment. Last year was a real good example. The two rivers that I operate on primarily, the Big Hole and the Jefferson, were too low to float, so my boys were able to go out and contract under different outfitters. This amendment would give them the type of flexibility so they could do this without worrying about breaking the law. They have been qualified guides for many years. They could work under any outfitter and they have their own equipment, so I would like to see this bill put through because it certainly would put the minds at ease of a lot of people like that, because they don't want to be breaking the law. I hope you give this bill favorable consideration.

PAUL S. ROOS, proponent. Submitted written testimony, brought in by Mr. Bradshaw, attached hereto as Exhibit #4.

Testifying Opponents and Who They Represent:

JERRY STRONG, Outfitter.

Opponent Testimony:

JERRY STRONG, opponent. I don't really want to be an opponent, I want to be a proponent, but I have some problems with the bill.

Last year we had approximately 1,650 people that this bill directly effects; 600 of them were outfitters and approximately 1,000 were guides. I employ five guides. There were 185 policies issued by workers' comp. We have over 600 outfitters but there were 185 policies issued so over 400 of them never bothered to buy any workers' comp to start with.

Guides are only temporary employees. I employ these people during the summertime and into the fall because I am also a hunting outfitter and a fishing outfitter. My problem is, who is going to cover these people? Workers' comp covers

these people because it provides a cushion. If one of my mules kicks one of my guides and breaks his leg, workers' comp pays the hospital bill and pays him some money while he is recovering. I'm not rich and I can't afford the rates they charge me right now which happen to be \$27.17 per hundred. This is astronomical, it is unbearable, I can't afford it. But at the same time, I have five good people working for me. If these people drop out, who is left to pay against the claims that are going to come? My understanding is that it is based on a history of how ever many people are involved in this thing. I don't know that for sure. There is very little information that I can get. I asked workers' comp if we are all at the same rate and they assured me that all guides and outfitters are at the same rate. Today I found out that the fishing guides are paying \$10 per hundred and I am paying \$27.17 per hundred. Somebody lied to me again. I don't know how these rates were established. I tried to find out because they couldn't tell me how many people are licensed in this state. I got this from the Department of Commerce. Does this cover my responsibility? It says we are going to make these people independent contractors.

The client is my responsibility, he books with me. According to the laws of Montana, he is my client. If I give him to an independent contractor, what does this do as far as my responsibility for his liability is concerned? Did I tell him that I was going to independently contract him out to somebody else? I did not. I'm not about to tell my clients this. I want something. I want the workers' comp rates to go down.

After talking to my accountant who is a CPA, he says you can't duck your obligations. If these people sue you you are still obligated to have workers' comp. (He held up some paper and said:) This is a copy of what they were talking about that workers' comp sent me. (Not included in exhibits). Guides cannot be independent contractors. Then in the bill here it says that they can be. One law says one thing and the other law says another, and that's my problem.

I appreciate Sen. Rasmussen bringing the bill up -- we need to do something. But does this solve my dilemma, or am I going to opt out? If one of my guides gets hurt and sues me, I will lose everything. Does this take care of the problem? That's my question.

Questions From Committee Members:

O'KEEFE: Question for Mr. Bradshaw. I might have to declare a conflict of interest on this one before it is all over with, but I have a question for you. I have 22 guides. Up until two years ago they were independent contractors. We were assigned a rate -- \$27 is cheap because the first rate we

got was \$38 per hundred for those guides -- we appealed it and had it brought down to \$8.53 since we don't have horses or axes or guns or fires or anything that causes these accidents out there. In reading this it seems to me that this bill only applies to float guides or any other type of guides, float or horseback or hiking or anything, that are involved with actually hunting or fishing. What happens to all the float guides out there who are whitewater float guides, historically independent contractors up until two years ago, where do they fall in under the way this bill is written?

BRADSHAW: I will have to give you my view of that and qualify it as simply that. Guides who are not hunting or fishing guides are not covered by state law, and you are probably aware of a guide who is a whitewater guide. Taking people down the river to fish, does not come under the constraints of this outfitting law; therefore, the representation of guide as employee in this law refers only to those kinds of guides. I would assume that the whitewater guide who is not a hunting or fishing guide can show that he is truly an independent contractor. Without this change in the law, he would still be able to go under workers' comp and get the proper independent contractors' exemption.

O'KEEFE: I guess that is not how workers' comp interprets it. (As of 1988). So, is there a way to work this bill, so that guides who aren't actively trying to kill something, or catch something, and are truly independent contractors, don't end up losing out? Is it the same statute?

BRADSHAW: That is the dilemma you have. There is no statute that regulates the conduct of whitewater float trips that don't involve hunting or fishing. Off the cuff, I would say that workers' comp misinterpreted this if they applied it to non-hunting and fishing guides. That is my opinion and I might be wrong about that, but I would be concerned that if you try to remedy their dilemma through a statute that doesn't already cover them, you may open up a whole new Pandora's box of regulations for those guys.

DRISCOLL: Question for Jerry Strong. I believe you said you have five guides who work for you, is that right? Do these five guides furnish anything besides themselves and their time?

STRONG: Yes. Workers' comp doesn't make a distinction between anybody. I have a packer, a cook, and five guides. I pay the same rate for all of them. Two of them work for me during the summertime as fishing guides only, and that's all they do. They have a boat and they take the people out fishing. I'm not even there. They furnish the equipment, the lunches, the whole bit, but they operate under me. My rates are the same. My packer never has a gun or fishing rod or anything in his hand. My cook stays in the tent and

cooks. All these rates are the same. Workers' comp told me that all rates for everybody in the guiding and outfitting business are exactly the same, and as this gentleman just told you, this is not true. I just found out today that it's not true and I don't know what the answer is.

DRISCOLL: Do you have to have a guide's license to cook?

STRONG: No sir.

DRISCOLL: Of the people you have, five of them have licenses?

STRONG: All of my people have licenses. This is another dilemma. I get a license for my cook. He isn't supposed to have one but if the cook happens to be riding down the trail with two fisherman and I'm not right there with him and he is stopped, he is now a guide. That happened. If he is with my clients and maybe I have had to stop back on the trail, and he is stopped, he had better have a license, so I buy them all guide licenses.

DRISCOLL: What does the guide furnish?

STRONG: My hunting guides furnish their own saddles, guns, hunting equipment, and that is all they furnish.

DRISCOLL: Why do they need you?

STRONG: Because the law says they do.

SIMPKINS: Do you furnish any equipment to the guides?

STRONG: No, I furnish it to the clients. The clients have to ride into the Bob Marshall they use my horses, my pack mules, my saddles, my tents, and my equipment. The equipment that the guides use themselves, their personal stuff that they need to use to guide with -- their own horse, saddle, parkas, everything like this -- they furnish themselves. My equipment for the hunting part of it is furnished by me -- tents, stoves, eating and cooking gear, food and the whole bit. On the fishing trips, as he has indicated, I don't furnish this. The only thing I furnish is that I am the outfitter, I book the clients, I make sure that the guides are qualified, certified and have licenses, and then they come along and have their own boats, fishing gear, etc.

SIMPKINS: Let's get back to the cook. Do you provide any tents, stoves, any equipment whatsoever for the cook to cook the meals?

STRONG: Yes sir. Technically, the cook is my employee.

SIMPKINS: So the guides are technically not your employees.

STRONG: That's not what Workers' Comp told me.

The last two years I have employed a cook who furnishes his own cooking equipment, his own tent, and he supplies the food and I pay him a flat rate for doing this, but I still pay workers' comp. I pay him \$5,000 to supply the food and I don't tell him when to cook and I don't tell him how to cook, he does his own thing. They still say he is an employee, but he has furnished it all.

RUSSELL: Any further questions from the committee?

None.

Closing by Sponsor:

RASMUSSEN: I think these people that Mr. Strong was questioned about were clearly employees so we are not dealing with them in this bill. We are dealing with those types of people who are totally independent and have all their own equipment, so we are just attempting to draw the line between those two categories. I think right now the line is blurred since this decision so I think this is all this bill does.

RUSSELL: Sen. Rasmussen, who will be carrying your bills in the House, both 49 and 153.

RASMUSSEN: I don't have anybody yet, so if you care to pick somebody from the committee, or if you want me to, I can get someone.

RUSSELL: This closes the hearing on SB 153.

- - - - -
DISPOSITION OF SB 49

Motion:

REP. SMITH: I move we CONCUR IN SB 49.

Discussion:

SIMPKINS: Question of Driscoll. The way I understand the question on this SB 49 is if the employee is regularly scheduled for six months or longer, the benefits have to start right now upon employment, but they are saying that if they thought the job was only going to be four months or something like this and all of a sudden they see a prolonged situation and they go beyond the six months, then the benefits would start at six months.

DRISCOLL: That's the way they do it now.

DRISCOLL: My problem is why do they need "regularly" on page 1, line 20? Presently it says a "part-time employee who is scheduled to work a regular schedule of 20 hours or more a week." To me that is clearer, "regular schedule," then when it says "who is regularly scheduled." There is a difference there, at least the way I read it, the management can play games with your schedule and the other way if you have a regular schedule of 20 hours, but if you missed a day you were still scheduled. I don't understand the whole bill. They don't provide benefits to temporary employees now. I don't know what it does to tell you the truth.

SMITH: It looks to me like they are merely clarifying what they have been doing all along.

COCCHIARELLA: Question of Eddy McClure. On page 1, lines 20 and 23, the use of the term "regularly scheduled" could that be interpreted differently from "who has a regular schedule".

McCLURE: Anything is possible. It would be a guess on my part, but "regularly scheduled" means routinely. I guess it means not haphazardly.

Vote:

RUSSELL: We have a motion on the floor DO CONCUR.

15 DO CONCUR votes, one against it (McCormick).

Do we have any volunteers as to who wants to carry this bill in the House?

Rep. Lee volunteered to carry this bill, SB 49.

- - - - -
DISPOSITION OF SB 153

Motion:

RICE: I move we CONCUR ON SB 153.

I also move the amendments.

Discussion:

KILPATRICK: Am I right in assuming that what this does is that it makes him an independent contractor now?

O'KEEFE: It makes them eligible for being classified as independent contractors by workers' comp. It doesn't automatically make them an independent contractor. It defines a test that they must meet to qualify as an

independent contractor. So they still would have to apply and it is not easy to do.

KILPATRICK: Does an independent contractor have to be covered under workers' comp?

O'KEEFE: No.

KILPATRICK: If this person is an independent contractor, is he qualified now for workers' comp? Do outfitters have to pay workers' comp on him or don't they. What is the deal here?

O'KEEFE: No, the outfitter would not be required to carry workers' comp on an independent contractor. Some outfitters require that independent contractors carry their own medical insurance. When we went the independent contractor route we were able to pay our people more than we do now with workers' comp on top of the bill. Basically what it does it saves the employers the workers' comp but they end up spending close to the same amount of money in increased wages and contracted services. An independent contractor has an option to carry his own insurance.

KILPATRICK: Why was Jerry Strong upset about this bill because this bill would make that guide into an independent contractor and save him money, wouldn't it?

DRISCOLL: As the bill is written, without the amendments, it says you are an employee or you are an independent contractor. The only test is that you only furnish personal guide service. So with the amendments the person who wanted to be an independent contractor would furnish personal guiding services, facilities, transportation, or equipment. If you didn't furnish one of those other three things you could not be an independent contractor. The outfitter furnishes everything for the customers, so the guide in this instance is furnishing his work tools, but the outfitter furnishes everything else. Those people are still going to be employees. In the case of a float fisherman furnishing the boat, fishing tackle, lunch for the day, and the bait, he could be an independent contractor under this bill with the amendments. You could play a lot of hanky panky with this bill without the amendments.

SMITH: The problem we have with this whole independent contractor status is the fact that everybody wants to be an independent contractor until they get arrested. Then they go to court and they collect the benefits. The only problem is there were never any premiums paid, so this is one of the things that this gentleman (Strong) is probably running into to make his rates so high, but it seems to me that there was an awful small percentage of guides who are paying workers' comp. One of them gets hurt and that just raises holy hell with his rates. I think this is poor legislation. It is a bad bill.

O'KEEFE: I agree with Rep. Smith as far as the problems that historically have occurred with independent contractors. When I read this bill I can see, for instance, that even in my situation this bill doesn't do anything. I still have employees. I have worked in this same type of thing before, being a guide, where I get a call at 8:00 Thursday night and someone says they need an extra guide on the Smith for five days, get there, you've got the job. I supply everything. I may never see the outfitter. I have guides who work for me who never see me. They are guides under my license. What happens here, for instance, I have guides who work for me a total of eight hours a summer, two half day float trips, and supply everything when I have 300 people on buses ready to go down the Middle Fork. Those people we have to pay workers' comp on. They truly are independent contractors. I guess I think it is good legislation for the people if it is that narrowly defined. It is a real problem out there for these outfitters and guides who have such a fluctuating flow of business. It's not like the old independent contractors in the logging business, where a lot of that occurred, where those guys were independent contractors until they got hurt. I think it is a good bill. I also think you could still play havoc with this bill, even with the amendments. It says "services and equipment." Well, if a guy brings his own oars and uses all my equipment he is still providing services and equipment and he can call himself an independent contractor. Yes, he has to apply, but I think it is a good bill because it is tight.

DRISCOLL: The reason they threw out those independent contractors was page 7, line 21. In order to be a professional guide you have to work under your employer's license. So if you are working under your employer's license you have to be an employee. So they have changed that and in order to be an independent contractor, even with these amendments, if you furnish the boat, oars, bait and a fishing pole and the outfitter says he will pay you \$5 an hour, you float until 5:00 tonight, you still are not an independent contractor because you cannot be under his control for hours and money. You can agree upon a fee -- floating from one point to another for X amount of dollars, no matter how long it takes and furnish everything. That is the only way you become an independent contractor.

I think the division needs to look at some of these independent contractors. What we ought to do is go through all these laws and change "independent contractor" to "independent businessman", then maybe it would be more understandable to a lot of people, because contractor seems to connote to a lot of people building something or hauling logs or something like that. Anybody who is in business can be an independent contractor; by law, you are an independent contractor. You hire employees if you are in business. So everybody who has a business here is an

independent contractor themselves, but then they have to pay comp on their employees.

If these professional guides or outfitters don't go to the comp division and get one of these pieces of paper saying that he is an independent contractor and goes to work for Mark (O'Keefe), and he didn't pay workers' comp, I would own his house because I would sue him for being an uninsured employer. So he had better either see my workers' comp policy or my exemption from the workers' comp division or he is still stuck.

SIMPKINS: I think if you look at this on the basis of self-employed it's the same thing. You can take a person who has a computer and they operate the computer, they are self-employed. If they have the computer in their home, a telephone in their home, and all this that is fine and dandy, but if they go to somebody's office and use their telephone or their computer, that's not self-employed. So you have to use your own equipment and everything down the line and that's all we're saying. With the amendment in here it is saying that if you are going to contract this person on the side as a self-employed person, that should relieve you of the workers' comp responsibility. There is a distinct advantage to me of being self-employed because all the equipment and everything is tax deductible. You are running your own separate business and you file your own income tax. There are a lot of tests they have to meet to see if they are an independent contractor or a self-employed person. I think it is pretty clear with that amendment in there that you better do something else.

WHALEN: Question for Clyde Smith. You made a statement earlier that I guess I didn't understand. You stated that some of these people don't pay the workers' comp premium, but then the fund ends up paying the claim. Why would they pay a claim if somebody hasn't paid the premium. Wouldn't they just say that the employer was uninsured and then tell them to go after the employer.

SMITH: That's not necessarily true. As in the case Mr. Strong was alluding to, he has a cook and there is no question in his mind that the man is an employee, so he says his guides are independent contractors. If he is covered under a master policy he is an insured employer, all he gets is penalties if somebody gets hurt. He would not come under the uninsured employers fund.

WHALEN: Say that again. He has a policy on himself but not on his workers?

SMITH: No, I didn't say on himself. He said he had a cook and he acknowledges that there is no way to get out of him being an employee. Suppose he says that the guides are

but he gets one of them hurt; that is not an uninsured employer because he has a master policy. All they do is go back on him with penalties and back premium.

WHALEN: What is a master policy?

SMITH: You get it from the state fund and you put up a deposit and you are insured.

WHALEN: So if he had no policy, then you would have your uninsured situation. If he had a master policy then the division would just go back on him for the back dues.

SMITH: Correct.

DRISCOLL: For example, HB 21 on the farm exemption. Workers' Comp didn't even go back and collect the premiums because their interpretation was they didn't owe the premium. The supreme court ruled that the person who got hurt got the benefits. Workers' Comp never got one dime out of that and I don't know how much they paid out in that case. It was a very expensive case. So there was no premium coming in and a whole lot of money going out, that's why we've got \$157 million debt.

O'KEEFE: Getting back to Jerry Strong again. The numbers he threw out about 600 outfitters out there and only 185 policies in effect, are really true. If you want an industry where people cheat, you have one right there. Workers' comp, I think, knows that. One reason is that it has only been two years since they have been required to have this. I would not even have known but I found out by accident and went into it. I think the people who came in here supporting the bill, the associations, the outfitters and guides and the floaters and fishers, they are the legitimate, above board businesses that are going to comply with this thing. It's like Jerry says, you've got to have a sheet of paper that says you are an independent contractor and then they have to sign a contract with you before they go to work with you, and our people always did. They ought to go after the bad guys in this industry. They are out there.

Vote: The amendments PASSED unanimously.

RUSSELL: Rep. Rice moved the bill PASS, as amended.

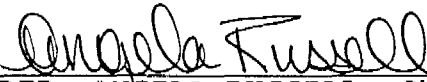
Vote: Fourteen votes to DO CONCUR on SB 153; two against (Smith and Whalen).

Rep. O'Keefe will carry this bill to the House.

- - - - -

ADJOURNMENT

Adjournment At: 4:15 P.M.



REP. ANGELA RUSSELL, Chairman

AR/mo

4709.MIN

LABOR AND EMPLOYMENT RELATIONS COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date 2-28-89

NAME	PRESENT	ABSENT	EXCUSED
Rep. Angela Russell, Chairman	✓		
Rep. Lloyd "Mac" McCormick, VC	✓		
Rep. Vicki Cocchiarella	✓		
Rep. Duane Compton	✓		
Rep. Jerry Driscoll	✓		
Rep. Bob Pavlovich, Vice	✓		
Rep. Bill Glaser		✓	
Rep. Tom Kilpatrick	✓		
Rep. Thomas Lee	✓		
Rep. Mark O'Keefe	✓		
Rep. Jim Rice	✓		
Rep. Richard Simpkins	✓		
Rep. Clyde Smith			
Rep. Carolyn Squires	✓		
Rep. Fred Thomas		✓	
Rep. Timothy Whalen	✓		

STANDING COMMITTEE REPORT

March 1, 1989

Page 1 of 1

Mr. Speaker: We, the committee on Labor report that SENATE BILL 153 (blue reference copy) be concurred in as amended .

Signed: _____
Angela Russell, Chairman

[REP. O'KEEFE WILL CARRY THIS BILL ON THE HOUSE FLOOR]

And, that such amendments read:

1. Page 2, line 22.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

2. Page 4, line 10.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

(R)

as independent contractors. S.B. 153 simply removes an artificial constraint to the recognition of certain guides as independent contractors. If a guide meets the workers compensation criteria defining an independent contractor, he should be so recognized. If he does not, he should be treated as an employee. S.B. 153 simply allows the latitude for that recognition when it is appropriate.

I urge your support of S.B. 153.

SENATE BILL 153

p91of3

Testimony of Stan Bradshaw
February 28, 1989

Madame Chairman and members of the committee, my name is Stan Bradshaw. Among other things, I work in the summer as a float fishing guide. I wish to testify in support of Senate Bill 153.

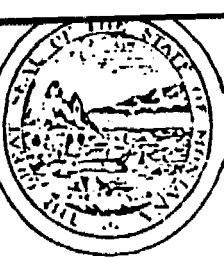
S.B. 153 seeks to amend language in the outfitters statute (section 37-47-301 et seq. MCA) which characterizes professional guides as "employees". The amendment adds language to the definition of "professional guide" which recognizes that a guide may also be an independent contractor.

Prior to the summer of 1988, the Workers Compensation Division apparently recognized that, in certain circumstances, guides could be considered independent contractors by certifying a number of guides as independent contractors (See attachment A). As a result, outfitters did not have to pay workers compensation premiums for those guides who were independent contractors.

In June, 1988 the Workers Compensation Division notified both outfitters and guides who applied for certification as independent contractors that, in part because of the in the laws "pertaining to Fish, Wildlife and Parks," (See attachment B), guides could not be considered independent contractors. The only law addressing this that was ever a Fish, Wildlife and Parks statute was the outfitter statute, which defined guides as employees.

This interpretation causes considerable difficulty for outfitters. The nature of the float-fishing outfitting business is one of fluctuation. Trips booked are most often day trips and are likely to be booked at any time. The numbers of clients can vary wildly. One day, an outfitter may have a party of four; the next he may have twelve people. Accordingly, the number of guides needed can fluctuate wildly. It is very difficult, if not impossible for an outfitter to keep a full complement of guides employed all the time. As a result, there are many float guides who have their own boat and who work for any number of outfitters as they are needed.

For example, I guided for at least three outfitters during the summer. I made a point of communicating to those outfitters that I was available on an as-needed basis to guide. I had my own equipment and own transportation. When I am on the river with the client, I am completely outside the control of the outfitter. He does not direct me where to fish, what flies to use, or what methods to use. As an independent contractor, those are all my decisions to make. Arguably, at least, these things bring me under the criteria of independent contractor.



TED SCHWINDEN, GOVERNOR

STATE OF MONTANA

MARGARET "PEG" CONDON BLDG.
550 LAST CHANCE GULCH

HELENA, MONTANA 59601

July 8, 1987

Jim VanMeter
Box 358
Clancy MT 59634

Re: Independent Contractor Exemption

Dear Mr. VanMeter:

Your application for exemption from coverage under the Workers' Compensation and Occupational Disease Act as an independent contractor has been approved in accordance with Section 39-71-401 (3) MCA, and ARM 24.29.706. This exemption is only recognized in the state of Montana.

This exemption from coverage under the Workers' Compensation and Occupational Disease Act applies only to you as an individual holding yourself out to the general public to be an independent contractor, doing business as J VanMeter, Guide, and does not include any employees you may hire. This exemption will be effective from 7/8/87 to 7/7/88 unless sooner cancelled upon your written request or otherwise by the Workers' Compensation Division.

Sincerely,

Karen Doig
Policy Compliance Investigator
Insurance Compliance Bureau

KD/cl

Attachment A

EXHIBIT 1DATE 2-28-89FILE SB153

DEPARTMENT OF LABOR & INDUSTRY

DIVISION OF WORKERS' COMPENSATION

TED SCHWINDEN, GOVERNOR

MARGARET "PEG" CONDON BLDG.
5 SO. LAST CHANCE GULCH

STATE OF MONTANA

HELENA, MONTANA 59601

June 27, 1988

TO: Interested Parties

FROM: Hiram Shaw, Chief
Insurance Compliance Bureau *HS*

SUBJECT: Fishing & Hunting Outfitters: Responsibilities Under the
Workers' Compensation Act

Businesses employing fishing and hunting guides must obtain a workers' compensation policy covering all employees. (Sec. 39-71-401, MCA)

Fishing and hunting guides do not qualify as independent contractors based on laws pertaining to Fish, Wildlife and Parks, Unemployment Insurance and Workers' Compensation.

Family Member Exemption Void: The Montana Supreme Court recently ruled unconstitutional which exempted members of an employer's family dwelling in the employer's household from coverage. Employer's family members must now be covered if paid wages.

Exceptions: There are many variations and exceptions to the general coverage requirements. The best rule of thumb is to assure all employees are covered, even if such employees are only temporary.

For further information about your specific situation and requirements, please call the Division of Workers' Compensation, Insurance Compliance Bureau, Uninsured Employers' Unit (444-6530).

Attachment B

6-0
Amendments to Senate Bill No. 153
Third Reading Copy

HB SB/53

Requested by Sen. Tom Rasmussen
For the Committee on Labor and Employment Relations

Prepared by Mary McCue
February 27, 1989

1. Page 2, line 22.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

2. Page 4, line 10.

Strike: "only"

Following: "services"

Insert: "and facilities, transportation, or equipment"

SB 153

IN REVIEWING SB 153 IT IS IMPORTANT TO REMEMBER THAT THIS BILL DOES NOT AUTOMATICALLY GIVE ANYONE ANYTHING. IT DOES, HOWEVER, ALLOW AN OUTFITTING BUSINESS THE SAME RIGHTS AS ALL OTHER SMALL BUSINESSES IN THE STATE. THAT RIGHT IS THE OPTION TO HIRE A QUALIFIED INDIVIDUAL TO PERFORM A TASK AS AN INDEPENDENT CONTRACTOR IF THAT INDIVIDUAL MEETS ALL THE REQUIREMENTS OF THAT STATUS AS DEFINED BY THE STATE. IN THE CASE OF THE OUTFITTER AND THIS BILL, THE INDIVIDUAL IN QUESTION IS THE GUIDE. PRIOR TO THE LAST SESSION OF THE LEGISLATURE THE LAW READ THAT A GUIDE WAS ENDORSED BY AN OUTFITTER AND THE DECISION OF EMPLOYEE/INDEPENDENT CONTRACTOR WAS MADE ON A CASE BY CASE BASIS. THE CURRENT LAW IS WORDED IN SUCH A WAY THAT IT DOES NOT REFLECT THE TRUE NATURE OF THE BUSINESS AND ELIMINATES THE DECISION MAKING PROCESS BY DEFINITION.

I KNOW OF NO OTHER LAW THAT PURPOSLY SUPERSEDES THE DECISION MAKING AUTHORITY OF THE WORKMANS COMPENSATION DIVISION BY DEFINING 'EMPLOYEE' WITHOUT REGARD TO THE ELEMENTS OF THE TASK PERFORMED BY THE INDIVIDUAL INVOLVED.

I ASK YOU TO PASS SB 153 AND LET THE DEFINITION OF EMPLOYEE/INDEPENDENT CONTRACTOR BE HANDLED AS IT HAS BEEN HISTORICALLY; ON A CASE BY CASE BASIS.

*Statute St of MT FWP 1983 87-4-123(b)

Jack D. Hutchinson

TESTIMONY ON SB 153

Rep. Angela Russell, Chair
House Labor Committee

Paul S. Roos
1630 Leslie
Helena, MT 59601
February 28, 1989

I would like to make three main points regarding the need and fairness of this proposed legislation.

1. Historically, Montana's float fishing outfitters have operated since at least right after World War II using guides as independent contractors.

a. An outfitter would need an occasional guide and pay the guide an agreed upon amount to take a client fishing. This has been going on since the 1940's.

b. Personally, in the late sixties as a guide I was paid as an independent contractor, and since 1970 we have used guides as independent contractors.

2. The nature of the business demands guides who fit the criteria of an independent contractor and who do not seem to fit the definition of an employee.

a. Hours are flexible and determined by the guide and the clients in most cases.

b. The guide by the nature of the job must be responsible to make decisions regarding when, where, and how the job must be done.

c. A guide knows that his job is to provide the client with an enjoyable day. The job description to accomplish this will vary from day to day and client to client.

d. Many if not most guides own their own equipment. In order for a guide to be truly professional, he or she must spend a lot of time on the river. It is a professional guide's business to know what's going on. He needs to own his own equipment in order to have access to day to day river conditions.

e. In our industry day to day demands as to the number of guides an outfitter needs fluctuates greatly. Therefore, it makes sense for guides to contract to different outfitters on a demand basis.

3. It has been my personal experience through the last few years in dealing with the issue of whether guides are employees or independent contractors that there is mass confusion and anxiety in the industry regarding this issue. There is no uniformity in interpretation or enforcement of Department of Labor and Industry regulations regarding floating/fishing outfitters. This legislation will enable a guide's job description to legitimately determine whether or not he or she is an employee or an independent contractor.

